75-1073

IN THE

Supreme Court of the United States

October Term, 1976

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

CHARLES MacDONALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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INDEX.

TABLE OF CASES.

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Opinion Below

Criminal complaint filed against three defendants in connection with their exhibition of two motion pictures was quashed by order entered in M-24 in the Court of Common Pleas, York County, and one defendant's preliminary objections to injunction sought by Commonwealth to enjoin future exhibition of motion pictures were sustained in order entered in 34 May Term, 1974, in the Court of Common Pleas, York County, and Commonwealth's appeals were consolidated. The Supreme Court, Nos. 20, 21 May Term, 1975, Roberts, J., held that statute which prohibits, *inter alia,* exhibiting of obscene photographs, figures or images but which does not specifically define forbidden conduct, could not constitutionally be applied to criminally punish expression on basis of

allegedly obscene content of motion pictures unless and until amended to specifically define forbidden conduct; that determination of what constituted common or public nuisance under statute prohibiting common or public nuisance was not sufficiently specific to be utilized to criminally punish expression on basis of motion pictures' allegedly obscene content; that Commonwealth was not entitled under theory of common law public nuisance to enjoin future showing of allegedly obscene motion pictures; and that motion pictures could not be enjoined under statute authorizing injunctive proceedings to prevent exhibition of any obscene photograph, figure, or image until adequate definition of prohibited conduct was supplied by General Assembly.

Jurisdiction

The judgment of the Pennsylvania Supreme Court was entered on October 30, 1975. A copy of such judgment appears in Supplementary Appendix. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

Question Presented

Is a statute embodying the *Miller v. California* test constitutionally necessary for a state to regulate hard core pornography or is it Constitutional permissible for a state to use the Common Law through the filing of a complaint in equity to define the standards of obscenity and in the same proceeding grant relief in prohibiting its sale and display.

Constitutional Provisions Involved

The First and Fourteenth Amendments to the Constitution.

Statement of Facts

This is an equity action against a motion picture owner to enjoin the public display of two films alleged to be obscene. The Complaint (see Supplementary Appendix) was filed by the District Attorney on behalf of the Commonwealth of Pennsylvania on April 30, 1974.

On May 10, 1974 the Defendant filed Preliminary Objections. The objections involved a demurrer and questioned the Constitutional basis for such an action. The case was submitted upon briefs of both parties.

On June 7, 1974 the Court of Common Pleas of York County by President Judge Robert I. Shadle sustained the Preliminary Objections in the nature of a demurrer and dismissed the plaintiff's complaint. The plaintiff immediately appealed to the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania on October 30, 1975 (see Supplementary Appendix) held that in effect the Common Law could not be used to regulate pornography, citing the *Grove Press Inc. v. The City of Philadelphia,* 418 F2d 83 (3rd circuit 1969). The Court held that the Common Law could not be used . . . "both to define the standards of protected speech and to serve as a vehicle for its restraint."

Reason for Granting the Writ

The Constitution of the United States specifically in regard to the first Amendment and the Due Process Clause of the 14th Amendment should not prohibit regulation of pornography using the complaint in equity which is a Common Law procedure. In this case the Complaint alleges that on April 17 and April 18, 1974, the Defendant obtained, advertised and displayed two films. These two

films were entitled "Deep Throat" and "The Devil and Miss. Jones." Both of these films were shown as part of a double feature at the Southern Theatre in York, York County, Pennsylvania.

"Deep Throat" is a sound motion picture in color with a running time of about one hour. The film portrays a woman who repeatedly perpetrates acts of fellatio. These acts are clearly displayed. In one scene, two nude males and one nude female engage in various sexual acts including cunnilingus and fellatio. In this movie there is the repeated showing of human male and female genitals in a state of sexual excitement.

The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

The said movie is obscene as obscenity has been defined by the Supreme Court of the United States in *Miller vs. California,* 93 S.Ct. 2607 (1973), and constitutes hard core pornography.

"The Devil and Miss Jones" is also a sound motion picture in color with a running time of approximately one hour. This film is about a virgin who committed suicide and was sent to a "reviewer" in hell. It was the reviewer's purpose to determine what should happen to Miss Jones.

Miss Jones indicated she wanted to go back and live for a little more time "Just for lust". She was introduced to a man who called himself the "teacher". The teacher taught her various sexual acts. In film she graphically engages in acts of fellatio, cunnilingus and in one scene she sucks upon the head of a live snake. This film has scenes where fruit, such as apples and grapes, are placed into the vagina and rectum, and then removed and eaten.

The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

The said movie is obscene as obscenity has been defined by the Supreme Court of the United States in *Miller vs. California,* 93 S.Ct. 2607 (1973), and constitutes hard core pornography.

Even though the Defendant has the right to be informed of what is sought to be proscribed, this notice must not necessarily be given by a statute. Such notice can be given by a complaint. The Court should be able to authoritatively construe the Common Law so as to allow regulation under the First Amendment and in the absence of a statute a municipality may remedy the wrong by reverting to the standards of the Common Law.

"The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of government." *Muglar v. Kansas,* 122 U.S. 205 at page 210 (December 5, 1887). A legislative act or judicial ruling which restricts a municipality's police power to combat commercial vice in the city, or limits a city's power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgement of the fundamental rights under the federal Constitution. *Muglar v. Kansas,* 122 U.S. 205 at 210, 211. See also *Stone v. Mississippi,* 101 U.S. 816, where the U.S. Supreme Court noted

> No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants . . . government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

The State is the source for the police power of a municipal corporation, in as much as, under our system of government, the police power was not surrendered to the federal government, but on the contrary, the States retained the power of enacting all such police regulations as to persons and property within their limits as do not encroach upon the powers of Congress to regulate commerce, nor conflict with the acts of Congress passed within the exercise of that power, nor deny rights guaranteed by the federal Constitution. Police power, exercisable by municipal corporations is, in turn, such as is delegated by the State.

The exercise of the police power is a governmental function, and the police power is ordinarily thought of as extending to anything relating to health or safety of the public which comes within the scope of municipal control, *Pennsylvania Company v. James,* 81 Pa. 194, or as concerning restriction on the use of property or conduct of persons detrimental to the public health, morals, or safety. *Philadelphia Electric Co. v. City of Philadelphia,* (1930) 152 At. 23, 301 Pa. 291. Also *Miller v. Seaman,* (1939) 8 At. 2d 415, 137 Pa. Super. 24.

It has been held that regulations must not be based upon any arbitrary desire to resist the natural operation of economic laws or purely esthetic considerations. *Scholl v. Borough of Yeadon,* (1942) 26 At.2d 135, 148 Pa. Super. 602. A case so holding, Appeal of White, (1926) 134 At. 409, 287 Pa. 259, however, cites U.S. Supreme Court as authority and it has now been held by the U.S. Supreme Court that, so far as federal constitutional prohibitions are concerned, it is within the legislative power to determine that a community should be beautiful as well as health, spacious as well as clean, well-balanced as well as carefully patrolled. *Burman v. Parker,* (1954) 75 Supreme Court 98.

It is also a well-recognized function of municipalities to promote and preserve public safety, morals, health, and general welfare. A municipality, by the exercise of police power, may determine its own standard of quietude. *Kistler v. Borough of Swarthmore,* (1939) 4 At.2d 244, 134 Pa. Super. 287.

The power being exercised by the County of York is one of the most basic powers of local government—the power possessed by municipal governments in aid of its duties to protect the public morals of the local community against the type of public conduct which is regarded as being *malum in se.* The term "morals" refers to the moral standards of the community; the norm or standard of behavior which struggles to make itself articulate in law. *Commonwealth v. Randle,* 133 At.2d 276, 279, and 183 Pa. Super. 603.

In addressing himself to the public morals issue and the preeminent power of local government to control the same, Woods describes the danger as being in the nature of "nuisance *per se.*" See the *Law of Nuisances* by H. G. Woods, Sections 23 and 24 at pages 45-46; the distinction between a public nuisance and a private nuisance is that a public nuisance is a nuisance that is common to all the community where it is committed as well as those of the public who may be travelling in that vicinity, while a private nuisance is one inflicting any injury personal to the party who is complaining or to his property. *Philips v. Davidson,* (1920) 112 At. 236, 269 Pa. 244. Public nuisance is an offense to the public rather than to certain persons. This may take the form of interfering with the comfortable enjoyment of life or property.

In Section 23, H.G. Woods describes the acts affecting public morals as public nuisances. He states there are

classes or kinds of businesses which are nuisances *per se* and the very fact that they are carried on in a public place is *prima facie* sufficient to establish the offense. See *Hudson v. Continental Oil Co., supra.* But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are classes of nuisances arising from the use of real property and from one's personal conduct that are nuisances *per se,* irrespective of the results and location, and the existence of which are only needed to prove in any locality, whether near or far removed from cities, towns, or human habitations to bring them within the purview of public nuisances. The Court has stated that a city should, as far as is practical, determine its own standards of quietude and other conditions under the police power. *Kistler v. Borough of Swarthmore,* (1939) 4 At. 2d 244, 134 Pa. Super. 287. Although not entitled to absolute quiet enjoyment of property, every person has the right to require a degree of quietude consistent with the standard of comfort prevailing in the locality wherein he lives. *Bedminister Township v. Vargo Dragway, Inc.,* (1969) 253 At.2d 659, 434 Pa. 100. This latter view are these intangible injuries which affect the morality of mankind and are in derogation of public morals and public decency.

In Section 24 of the *Law of Nuisances* by H.G. Woods is the concept of wrongs which are considered *malum in se.* This class of nuisances are of that aggravated class of wrongs, that, being *malum in se,* the Courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of

evil manners, and anything that produces these results finds no encouragement from the law, but is universally regarded and condemned by society as a public nuisance.

The municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and a flow from the Common Law rather than from "expressed" provisions in the city charter or the general law of the State. See the *Law of Nuisances,* Woods, Section 743 at page 972;

> Section 743—"No control over nuisances without special power—therefore, a municipal corporation had no control over nuisances existing within its corporate limits except as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance by Common Law or by statute, which is detrimental to the health of the inhabitants it may be abated by the authorities, but it must be a nuisance at Common Law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of expressed or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The Common Law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are injured by the thing abated.

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right, but the obligation to remove the nuisance; at page 498:

> The rule is delcared to be settled, without dissent, that without a special grant of authority, public

> corporations, may, as common law, power, cause the abatement of nuisances, and if a nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the Constitution.

Apart from specific statutes, the abatement of nuisances by municipalities is a common exercise of the governmental function, and municipal authorities have a right to prohibit or abate a public nuisance dangerous to health or safety of its citizens. *Borough of Tyrone v. Stevens,* (1897) 36 At. 166, 178 Pa. 543. Police power is thus available to suppress a nuisance whether it be offensive to hearing, smell, or sight. *Walnut and Quince Streets Corporation v. Mills,* (1931) 154 At. 29, 303 Pa. 25.

The importance of this municipal power was stressed by the U.S. Supreme Court in *James Phalen v. the Commonwealth of Virginia,* 12 L.Ed. 1030, 1033 (1850);

> The suppression of nuisances injurious to public health or morality is among the most important duties of government.
> It is a principle of the common law, that the King cannot sanction a nuisance . . .

It is respectfully submitted that the citizens of the County of York, Pennsylvania, as the citizens of the United States of America, have a federally protected right to live in the community whose public morals, moral values, and environment are free from the degrading and corrupting influences of patently hard-core pornography. One of the fundamental rights essential to the concept of well-ordered liberty, mainly the right to enjoy "common

decency" is to live in a community whose public morals, moral values, and environment are free from illegal, degrading, and corrupting influence. It is further submitted that the rights of common decency can be protected by the police power and the Home Rule authority which is inherent in municipal authorities and the Common Law.

It is respectfully submitted that a statute can be construed in light of the common law and *stare decisis.* The Pennsylvania Crimes Code, Act of December 6, 1972, P.L. .... No. 534 which sought to define and regulate obscene material was declared unconstitutional as a result of the United States Supreme Court decision in *Miller v. California,* 413 U.S. 15; 93 S.Ct. 2607, 37 L.Ed. (2d) 419 (1973). The Pennsylvania Supreme Court refused to "authoritatively construe" the statute to embody the *Miller v. California* test. The Pennsylvania statute clearly embodies the first part of the *Miller* test. The second and third parts are not set forth in the statute.

It is submitted that statutes are oftentimes the outline, leaving the details of the most vital importance to be filled in by judicial law making. The Supreme Court of Pennsylvania, using common law principles and *stare decisis,* could have construed the statute in light of *Miller v. Califonia.*

It is further submitted that a cause of action can be initiated without a statute and can be based upon the Common Law. The permanency of the Common Law, its cohesiveness and tradition, and the direction it gives to society makes it equal or coordinate to the authority of the statute. The mere fact that a statute is not available cannot deny common law protection. Where there is a wrong, whether there be a staute or not, there can be a remedy. This remedy can be sustained by reference to the Common Law.

It is further submitted that the statutes are the source of police power and its exercise is a legitimate governmental function to regulate the health, morals, and safety of a community. A municipality in the absence of a statute may remedy the wrong by reverting to the standards of the Common Law. A standard which is the slow fruit of a long-fought controversy between opposing interests.

The definition and regulation of obscenity are set forth in the *Miller v. California* test. The criteria of this test are:

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest and

2. whether the work depicts or describes, in a patently offensive way, "sexual conduct specifically defined by the applicable state law," and

3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

A local community pursuant to police power and to abate what it considers a nuisance should be able to set forth standards based upon the long-standing tradition of *stare decisis* and the Common Law. Such standards, as they exist in *Miller v. California,* are clear and precise and could enforce equitable relief.

The law is *Miller v. California* and legislation is merely a supplement to or a re-definition of the Common Law as decided by the highest Court in the land.

It is respectfully submitted that the localities using the standards of *Miller v. California* can insure the health, safety, and morals within the scope of their municipal control.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be granted.

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75-1073

SUPPLEMENTARY APPENDIX

IN THE

Supreme Court of the United States

October Term, 1976

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vs.

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INDEX TO APPENDIX.

APPENDIX.

Exhibit No. 1.

JUDGMENT.

COMMONWEALTH of Pennsylvania,
Appellant,

v.

Charles MacDONALD et al.

COMMONWEALTH of Pennsylvania,
Appellant,

v.

Charles MacDONALD.

Supreme Court of Pennsylvania.

Oct. 30, 1975.

Criminal complaint filed against three defendants in connection with their exhibition of two motion pictures was quashed by order entered in M-24 in the Court of Common Pleas, York County, and one defendant's preliminary objections to injunction sought by Commonwealth to enjoin future exhibition of motion pictures were sustained in order entered in 34 May Term, 1974, in the Court of Common Pleas, York County, and Commonwealth's appeals were consolidated. The Supreme Court, Nos. 20, 21 May Term, 1975, Roberts, J., held that statute which prohibits, inter alia, exhibiting of obscene photographs, figures or images but which does not specifically define forbidden conduct, could not constitutionally be applied to criminally punish expression on basis of allegedly obscene content of motion pictures unless and until amended to specifically define forbidden conduct; that determination of what constituted common or public nuisance under statute prohibiting

common or public nuisance was not sufficiently specific to be utilized to criminally punish expression on basis of motion pictures' allegedly obscene content; that Commonwealth was not entitled under theory of commonlaw public nuisance to enjoin future showing of allegedly obscene motion pictures; and that motion pictures could not be enjoined under statute authorizing injunctive proceedings to prevent exhibition of any obscene photograph, figure, or image until adequate definition of prohibited conduct was supplied by General Assembly.

Affirmed.

Eagen, O'Brien, and Nix, *J.J.*, concurred in result.

Jones, C. J., dissented.

1. Obscenity—5.

"Motion pictures" are "photographs" or "images," within purview of statute forbidding exhibition or showing of, inter alia, any obscene photograph, figure or image, and thus such statute applies to motion pictures. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §5903(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law—48(1).

Supreme Court has duty to so construe a statute as to sustain its validity if such construction is fairly possible. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 1 Pa.C.S.A. §1922(3).

3. Statutes—212.

Definition of "sexual conduct" contained in statutes restricting availability of sexually-oriented materials to persons under the age of 17 years could not be utilized to give necessary definiteness to statute restricting availability of obscene data to adults since it could not be presumed that General Assembly would wish to restrict adults to receiving material fit for children. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §5903(a), (e)(3).

4. Constitutional Law—70.1(6).

Where proposed construction of statute restricting availability of obscene material to adults drew no support from language of statute and was only one among several specific definitions of sexual conduct which might be permissible under First Amendment, Supreme Court could not choose among them, in absence of guidance from General Assembly, without intruding upon legislative province. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §5903(a); U.S.C.A.Const. Amend. 1.

5. Criminal Law—13.1(13).

Statute which prohibits, inter alia, exhibiting of obscene photographs, figures or images, but which does not specifically define forbidden conduct, could not constitutionally be applied to criminally punish expression through exhibition of motion pictures on basis of pictures' allegedly obscene content. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §5903(a); U.S.C.A.Const. Amend. 1.

6. Criminal Law—13.1(2).

Determination of what constitutes common or public nuisance under statute prohibiting common or public nuisance was not sufficiently specific to be utilized to criminally punish expression through exhibition of motion pictures on basis of pictures' allegedly obscene content. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §6504.

7. Pleading—214(2).

Preliminary objections admit, for purpose of testing sufficiency of complaint, all properly pleaded facts, but not conclusions of law. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.)

8. Nuisance—59, 60.

A thing may be a public nuisance either because it is so declared by statute, either explicitly or implicitly, and alternatively, may be declared a nuisance as a matter of common law, if, though not prohibited by statute, it unreasonably interferes with the rights of the public. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.)

9. Nuisance—80.

Commonwealth was not entitled to enjoin future exhibition of allegedly obscene motion pictures on theory that exhibition of pictures constituted common-law public nuisance. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.)

10. Nuisance—80.

Statute authorizing injunction against use of any building for purposes of fornication, lewdness, assignation, and/or prostitution proscribes only use of building for purpose of engaging in illicit sexual conduct and thus provided no basis for enjoining of future showing of allegedly obscene motion pictures in absence of allegations that any buildings were being used for purpose of engaging in illicit sexual conduct. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 68 P.S. §§467-473.

11. Nuisance—80.

Future showing of allegedly obscene motion pictures could not be enjoined under statute authorizing injunctive proceedings to prevent exhibition of any obscene photograph, figure or image until adequate definition of obscenity was supplied by the General Assembly. (Per Roberts, J., with one Justice concurring and three Justices specially concurring.) 18 Pa.C.S.A. §5903(h); U.S.C.A.Const. Amend. 1.

———o———

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Harold N. Fitzkee, Jr., Donn I. Cohen, York, for appellees.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY and NIX, JJ.

OPINION OF THE COURT.

ROBERTS, Justice.

These appeals arise out of a two-pronged effort by the Commonwealth to prevent the showing of certain alleged-

ly obscene motion pictures. The Commonwealth first filed a criminal complaint against Charles MacDonald, Raetta Thompson, and Lance Wolf alleging that they had violated sections 5903[1] and 6504[2] of the Crimes Code by

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[1] 18 Pa.C.S. § 5903 (1974). The pertinent portions of this section provide:

"(a) Offenses defined.—Whoever sells, lends, distributes, exhibits, gives away or shows to any person 17 years of age or older or offers to sell, lend, distribute, exhibit or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show to any person 17 years of age or older, or knowingly advertises in any manner any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, or whoever designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, figure, image, matter, article or thing or whoever writes, prints, publishes or utters or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, or whom, or by what means any obscene book, picture, writing, paper, comic book, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, is guilty of a misdemeanor of the second degree.

"(b) Obscene defined.—'Obscene,' as used in this section, means that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest."

[2] 18 Pa.C.S. § 6504 (1974). This section provides:

"Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor of the second degree.

(Footnote continued on following page)

exhibiting the motion picutres "Deep Throat" and "The Devil in Miss Jones." Subsequently, the Commonwealth filed a complaint in equity against MacDonald only seeking to enjoin exhibition of those motion pictures in the future. Appellees filed a petition to quash the criminal complaint and preliminary objections to the complaint in equity. The court of common pleas quashed the criminal complaint on the ground that the statutes in question violated the First Amendment to the United States Constitution as interpreted by *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). It also sustained the preliminary objections to the complaint in equity on the ground that the invalidity of the obscenity statute left no "legal basis upon which the films in question can be determined to be obscene." These appeals followed[3] and we consolidated them for oral argument. We now affirm.

The criminal charges under sections 5903 and 6504 will be discussed in parts I and II of this opinion, respectively. The action in equity will be considered in part III.

(Footnote continued from preceding page)

"Where the nuisance is in existence at the time of the conviction and sentence, the court, in its discretion, may direct either the defendant or the sheriff of the county at the expense of the defendant to abate the same."

[3] Our jurisdiction over the criminal proceeding is founded upon the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, § 202(9), 17 P.S. § 211.202 (9). (Supp. 1974). Our jurisdiction over the equity proceeding is founded upon *Id.* § 202 (4), 17 P.S. § 211.202(4).

I

The charges of violation of section 5903, appearing in count one of the criminal complaint, read as follows:

> "Defendant[s] did exhibit and show to persons over 17 years of age, obscene photographs and images that were cast upon a motion picture screen. The photographs and images depicted acts of oral and anal sodomy and sexual intercourse, and pictured the genitals of males and females in a state of excitement. The photographs and images were contained in a motion picture film, which when taken as a whole was obscene."

[1] Appellees moved to quash the indictment on the ground that it failed to charge a crime, because (1) the statute does not prohibit the exhibition of an obscene motion picture and (2) the statute was unconstitutionally vague and therefore invalid. The court of common pleas rejected the first contention but agreed with the second and quashed count one of the complaint. We agree that section 5903 does attempt to prohibit exhibition of obscene motion pictures but that it is unconstitutional insofar as it prohibits distribution or exhibition of obscene materials to persons over the age of 17.[4]

Section 5903(a) forbids "any person" to exhibit or . . . show . . .

> "any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature . . ."

[4] The portions of § 5903 prohibiting distribution of exhibition of obscene materials to persons under the age of 17 are not in issue here.

Surely a motion picture is simply a series of "photographs" or "images." Nevertheless appellees argue that the omission from the list of prohibited materials of any specific references to "motion pictures" indicates a legislative intent to omit them from the scope of the prohibition.

The only factor which even lends surface plausibility to appellees' proposed construction is the fact that other portions of section 5903 do specifically mention motion pictures.[5] From this appellees argue that omission of any such specific reference from section 5903(a) must have been intentional. We cannot agree.

Whatever might be the case if the entire statute were drafted at one time, we believe that the history of this section precludes the inference which appellees seek to draw. Section 5903(a) of the Crimes Code was derived, without any pertinent changes, from section 524 of the Penal Code.[6] Thus it is presumed that the General

[5] Section 5903(c)(1) prohibits distribution to minors of

> "any picture, photograph, drawing, sculpture, *motion picture film*, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors . . ." (emphasis added)

Section 5903 prohibits the admission of minors to any

> "*motion picture show* or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors . . ." (emphasis added)

[6] Act of June 24, 1939, P.L. 872, § 524, as amended by Act of October 20, 1939, P.L. 1330, § 1 (formerly codified as 18 P.S. § 4524 (1963)), repealed by Act of December 6, 1972, P.L. 1605, No. 334, § 5.

Assembly intended to retain the prior law except as it was explicitly altered.[7] See Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1961, 1962 (Supp.1975). There is no indication that motion pictures were excluded from the scope of section 524, which is clearly intended as a comprehensive prohibition on the distribution and exhibition of all types of obscene materials. Nor, we think, can the addition of new and extremely detailed provisions governing the exhibition and distribution of obscene materials to minors be construed to restrict the scope of the prohibition of or distribution of similar materials to adults.

Appellee would have us construe the statute to avoid the constitutional question. While there is some value to construing statutes narrowly simply to avoid or postpone constitutional adjudication, we do not believe that this factor is sufficient to justify disregard of the more probable intent of the General Assembly when that intent is expressed as plainly as it is in this case. Consequently, we conclude that motion pictures are "photographs" or "images" within the meaning of section 5903(a).

Our analysis of the validity of the statute before us must begin with the United States Supreme Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In *Miller* the Court ended a long period of uncertainty regarding the constitutional limits of govern-

[7] The primary difference between section 524 of the Penal Code and the pertinent portion of section 5903 is the restriction of section 5903(a) to obscene materials furnished to persons over the age of 17. This reflected the adoption in section 5903(c), (d) and (e), of a new comprehensive scheme of regulation covering materials furnished to minors.

mental power to regulate obscene materials and laid down a five-part standard for the validity of such regulation:

> "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation [1] to works which depict or describe sexual conduct. [2] That conduct must be specifically defined by state law as written or authoritatively construed. [3] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, [4] which portray sexual conduct in a patently offensive way, and [5] which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

Id. at 24-25, 93 S.Ct. 2614-15 (citation and footnote omitted).

Examining the pertinent portion of section 5903 on its face,[8] we find that it fails to satisfy the *Miller* standard. Section 5903(a) is a wide-ranging prohibition on the distribution or exhibition of obscene materials with the following definition of "obscene" appearing in section 5903(b):

> " 'Obscene,' as used in this section, means that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest."

On its face this appears to satisfy only what we have labeled as the third element of the *Miller* standard. However, the *Miller* standard may be satisfied if the

[8] See note 1 supra.

statute, as authoritatively construed, complies with all of the requirements of *Miller.*[9] We therefore, turn to past constructions.

We have not previously construed this precise statutory provision because it is part of the recently enacted Crimes Code. However, the portion before us in this case is identical to a prior statute[10] which we construed in *Commonwealth v. LaLonde,* 447 Pa. 364, 368 n. 4, 288 A.2d 782, 784 n. 4 (1972), to incorporate all of the requirements of the then-understood requirements of the First Amendment:

> "[T]hree elements must coalesce: it must be established that
>
> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
>
> (b) the material is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and
>
> (c) the material is utterly without redeeming social value."

This construction satisfies four of the *Miller* requirements. Element (a) corresponds to requirement [3] of the *Miller* standard. Element (b) insures that requirements [1] and [4] are met. Finally, it is clear that if material is "utterly without redeeming social value," it must certainly lack "serious literary, artistic, political, or scientific value," so that requirement [5] of the *Miller* standard is met.

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[9] 413 U.S. at 24, 93 S.Ct. at 2615.

[10] Act of June 24, 1939, P.L. 872, §524, as amended (formerly codified as 18 P.S. §4524 (1963)), repealed by Act of December 6, 1972, P.L. 1605, No. 334, §5.

However, as the Commonwealth concedes, nothing in our prior construction of the statutory language satisfies the remaining requirement of the *Miller* standard: "That conduct [whose depiction or description is forbidden] must be specifically defined by state law . . . ." 413 U.S. at 25, 93 S.Ct. at 2615. Compare 18 Pa.C.S. §5903(c)-(e).[11]

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[11] Those subsections provide as follows:

"(c) Minors.—It shall be unlawful for any person knowingly to sell or loan for monetary or other valuable consideration to a minor:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in clause (1) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

"(d) Admitting minor to show.—It shall be unlawful for any person knowingly to exhibit for monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture show or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, except that the foregoing shall not apply to any minor accompanied by his parent.

"(e) Definitions.—As used in subsections (c) and (d) of this section:

(1) 'Minor' means any person under the age of 17 years.

(2) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(Footnote continued on following page)

Thus, the way is not open for us to follow those jurisdictions which have concluded that their statutes, as construed prior to *Miller*, satisfy the standard there delineated.[12]

(Footnote continued from preceding page)

(3) 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(4) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) 'Sadomasochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual excitement, or sadomasochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful, or morbid interests of minors; and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(iii) is utterly without redeeming social importance for minors.

(7) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant; and

(ii) the age of the minor: Provided, however, That an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

[12] *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (2d Dist. 1973), cert. denied, 418 U.S. 937, 94 S.Ct. 3225, 41 L.Ed.2d 1172 (1974); *People v. Nissinoff*, 43 Cal.App.3d 1025, 118 Cal.Rptr. 457 (1st Dist.1974); *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456

(Footnote continued on following page)

The Commonwealth, however, requests that we now construe section 5903(b) so that it will meet the requirements of *Miller*. It proffers two suggested constructions which it contends would accomplish this purpose.

The first of the suggested constructions would adopt the definition of "sexual conduct" contained in section 5903(e)(3) as a limit on the application of section 5903(a). That definition provides:

> "'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed genitals, pubic area, buttocks or, if such a person be a female, breast."

(Footnote continued from preceding page)

(1973), cert. denied, 418 U.S. 939, 94 S.Ct. 3227, 41 L.Ed.2d 1173 (1974); *Hall v. Commonwealth*, 505 S.W.2d 166 (Ky. 1974); *State ex rel. Wampler v. Bird*, 499 S.W.2d 780 (Mo.1973); *State v. Little Art. Corp.*, 191 Neb. 448, 215 N.W.2d 853 (1974); *State v. Harding*, N.H., 320 A.2d 646 (1974) (semble) (may have modified construction sub silentio); *People v. Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973) (semble) (same); *State ex rel. Keating v. A Motion Picture Film Entitled "Vixen"*, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973); *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798, cert. denied, 419 U.S. 902, 95 S.Ct. 186, 42 L.Ed.2d 148 (1974).

A number of the decisions listed above were based upon the dubious premise that the requirement of specifically defined sexual conduct added nothing to the prior test for obscenity when that test was considered together with the requirement that a criminal statute give fair warning of the prohibited conduct. *Hall v. Commonwealth*, supra; *State ex rel. Wampler v. Bird*, supra; *State v. Little Art, Corp.*, supra; *Price v. Commonwealth*, supra. In light of the considerable effort expended on discussion of the requirement of specific definition in the *Miller* opinion, see 413 U.S. at 25-26, 93 S.Ct. at 2615, and the nature of the examples given of definitions which would satisfy the requirement, see id. and discussion in text accompanying note 11 infra, we cannot assume that this aspect of the *Miller* test is a nullity.

At first glance, this suggested use of a definition in one subsection to give the necessary definiteness to another subsection has considerable attraction. Compare *Commonwealth v. Morgan,* ..... Pa. ....., ..., 331 A.2d 444, 446 (1975); 2A J. Sutherland, Statutes and Statutory Construction §47.16 (4th ed. C. Sands 1973). However, on more careful consideration, the suggested construction proves unacceptable.

[2] The definitions contained in subsection (e) are explicitly limited to use in subsections (c) and (d). By itself, this would not be an insurmountable obstacle to the suggested construction, for it is our duty to so construe a statute as to sustain its validity if such a construction is fairly possible. Statutory Construction Act, 1 Pa.C.S. §1922(3) (Supp.1974); *Bentman v. Seventh Ward Democratic Executive Committee,* 421 Pa. 188, 218 A.2d 261 (1966).

[3] What makes the suggested construction unacceptable is the purpose of the limitation on the use of the definitions in subsection (3). The provisions of the statute to which the definitions apply[13] restrict the availability of sexually-oriented materials to persons under the age of 17 years, while the provision under consideration here restricts the availability of obscene matter to adults. We cannot presume that the General Assembly would wish to restrict adults to receiving materials fit for children. As Judge Learned Hand wrote in *United States v. Kennerley,* 209 F. 119, 121 (S.D.N.Y.1913):

> "To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."

[13] See note 8 supra.

The second construction suggested by the Commonwealth derives from language in *Miller* itself. After stating the applicable standard, the Court continued:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under . . . the standard announced in this opinion, *supra:*
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

413 U.S. at 25, 93 S.Ct. at 2615.[14]

In the companion case of *United States v. 12 200-ft. Reels of Super 8mm. Films,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), which arose under a federal statute, the Court remarked in a footnote:

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where '"a serious doubt of constitutionality is raised"' and '"a construction of the statute is fairly possible by which the question may be avoided."'

[14] The Court also cited "Oregon Laws 1971, c. 743, Art. 29, §§255-262, and Hawaii Penal Code, Tit. 37, §§1210-1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126-129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression." 413 U.S. at 25 n. 6, 93 S.Ct. at 2615 n. 6. The pertinent provisions of the Oregon statute are quoted in *People v. Ridens,* 59 Ill.2d 362, 386, 321 N.E.2d 264, 276-77 (1974) (dissenting opinion).

> [citations omitted] If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene', 'lewd', 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe the regulated material in [certain federal statutes], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* . . . ."

Id. at 130 n. 7, 93 S.Ct at 2670 n.7.

The Commonwealth urges us to construe the word "obscene," as used in section 5903(b) to refer only to the type of material indicated by the Supreme Court's "examples."[15] We conclude that we cannot so construe the statute, even to save its validity.

[4] What the Commonwealth urges is not mere construction but wholesale re-writing. The proposed construction is not even *a* possible meaning of the words of the statute when used in their ordinary senses. It draws no

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[15] This approach has been adopted by a number of jurisdictions. *Pierce v. State*, 292 Ala. 473, 296 So.2d 218 (1974); *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974); *Rhodes v. State*, 283 So.2d 351 (Fla.1973) (prospective application only); *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *Mangum v. Maryland State Bd. of Censors*, 273 Md. 176, 328 A.2d 283 (1974); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974) (prospective application only); *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974) (prospective application only); *State v. Bryant*, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S.Ct. 238, 42 L.Ed. 2d 188 (1974); *State v. Watkins*, 262 S.C. 178, 203 S.E.2d 429 (1973), cert. denied, 418 U.S. 911, 94 S.Ct. 3204, 41 L.Ed.2d 1157 (1974); *West v. State*, 514 S.W.2d 433 (Tex.Cr.App.1974); *State v. J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949, 94 S.Ct. 3217, 41 L.Ed.2d 1166 (1974) (semble) (may have been applying pre-*Miller* construction); *State ex rel. Chobot v. Circuit Court*, 61 Wis.2d 354, 212 N.W.2d 690 (1973).

support from either surrounding language in the same statute, compare *Commonwealth v. Morgan*, ... Pa. ....., ..., 331 A.2d 444, 446 (1975); 2A J. Sutherland, Statutes and Statutory Construction §47.16 (4th ed. C. Sands 1973), or other statutes in pari materia, see Statutory Construction Act, 1 Pa.C.S. §1932 (Supp.1974); 2A J. Sutherland, Statutes and Statutory Construction, supra §45.11. Insofar as any intention of the General Assembly is concerned, the proposed construction is entirely arbitrary.

Even the necessity for stretching the statutory language might not prevent adoption of a construction which would preserve the validity of the statute were there only one construction which would do so. This was the basis for our former construction adding the elements of patent offensiveness and utter lack of social value to those specifically enumerated in the statute. See *Commonwealth v. LaLonde*, 447 Pa. 364, 368 n. 4. 288 A.2d 782, 784-85 n. 4 (1972). The First Amendment, as then understood, forbade the enforcement of any regulation of obscenity which failed to include those elements in the definition. In the present case, however, there are many possible specific definitions of sexual conduct which might be permissible under the First Amendment and we cannot choose among them, in the absence of guidance from the General Assembly, without intruding upon the legislative province.

This point was succinctly put by Justice Calogero of the Louisiana Supreme Court in *State v. Shreveport News Agency*, La., 287 So.2d 464 (1974), where that court also refused to redraft the obscenity statute before it to comply with *Miller*.

"[T]he State here asks us to construe Louisiana's nonspecific, vague statute as prohibiting certain specified conduct.

"But what, or which conduct? The State would argue that we have several options. There are two examples of such specifically described conduct in the *Miller* decision itself. That would suffice. Or why not the obscenity statute adopted by the State of Hawaii, or the State of Oregon? They each have a good one. Well, for that matter, why not engraft onto Louisiana's obscenity statute the specific conduct outlined in the obscenity ordinance of the City of New Orleans. After all, it was passed by the New Orleans City Council after, and in response to *Miller*, and being a studied effort on their part may well comply with the United States Constitutional standards outlined in *Miller*.

. . .

". . . [W]e have properly concluded in our opinion that it is not this Court's province to write an obscenity law for the State of Louisiana, but rather the State Legislature's."

Id., 287 So.2d at 472 (concurring opinion).

As a final consideration, it would be peculiarly inappropriate for us to engage in statutory draftsmanship without legislative guidance, for we must ultimately pass upon the validity of the resulting legislation under article I, section 7 of the Pennsylvania Constitution. We therefore decline to embark upon any such foray into the legislative sphere. In so doing we join the position of our

own Superior Court[16] and the Supreme courts of several other jurisdictions.[17]

[5] We therefore conclude that section 5903(a) fails to satisfy the *Miller* standard and therefore may not constitutionally be applied unless and until it is amended to specifically define the sexual conduct whose depiction or description is to be regulated thereby.

II

[6] We next turn to the portion of the criminal complaint charging violation of section 6504 of the Crimes Code.[18] This accusation was contained in count two of the complaint, which read:

"[Defendants] did set up and maintain a public and common nuisance by exhibiting, or causing to be exhibited, grossly obscene films for a consideration. [The allegations regarding the nature of the films in count one were then incorporated by reference.]"

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[16] *Commonwealth v. Winkleman*, 230 Pa. Super. 265, 326 A.2d 496 (1974) (holding unconstitutional Act of June 24, 1939, P.L. 872, §528, as amended (formerly codified as 18 P.S. §4528), repealed by Act of December 6, 1972, P.L. 1605, No. 334, §5). The statute held unconstitutional in *Winkleman* prohibited "any dramatic, theatrical, operatic, or vaudeville exhibition or the exhibition of fixed or moving pictures of an obscene nature."

[17] *Mohney v. State*, Ind., 300 N.E.2d 66 (1973); *State v. Wedelstedt*, Iowa, 213 N.W.2d 652 (1973); *State v. Shreveport News Agency*, La., 287 So.2d 464 (1973); *Commonwealth v. Horton*, Mass., 310 N.E.2d 316 (1974); *Art Theater Guild, Inc. v. State*, Tenn., 510 S.W.2d 258 (1974).

[18] See note 2 supra.

Appellees contended in their motion to quash the complaint that (1) the conduct described in the complaint does not constitute a "common or public nuisance" within the meaning of section 6504 and (2) the concept of "public nuisance," if used as a standard to restrict expression is unconstitutionally vague and overbroad. The trial court concluded that section 6504 could not constitutionally be applied to the conduct charged in the complaint and therefore quashed count two. We agree.

Section 6504 does not define the term "common or public nuisance." However, that section reenacts language formerly contained in section 612 of the Penal Code.[19] Consequently, we must look to constructions of the prior statute to ascertain the meaning of section 6504. Statutory Construction Act, 1 Pa.C.S. §§ 1922(4), 1962 (Supp. 1975).

However, past appellate cases involving criminal prosecutions for maintaining a public nuisance have not attempted to define the term. They have instead simply decided whether to append the label "public nuisance" without stating reasons for the decision. Generalization is further hampered by the fact that the great bulk of these cases have concerned a single type of conduct:

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[19] Act of June 24, 1939, P.L. 872, §612 (formerly codified as 18 P.S. §4612 (1963)), repealed by Act of December 6, 1972, P.L. 1605, No. 334, §5. In addition to the provisions carried forward into §6504, §612 provided:

> "All obstructions to private roads, laid out according to law, shall be nuisances, which would be nuisances in cases of obstructions to public roads or highways.
>
> "Whoever keeps or exhibits any gaming table, device or apparatus to win or gain money or other property of value, or engages in gambling for a livelihood, or aids or assists others to do so, or who sells tickets or policies in a lottery, is guilty of nuisance."

obstructing a public highway.[20] Nevertheless, it does appear from the few cases involving other types of conduct[21] that the offense is defined by reference to the corresponding common law crime.

Dean Prosser has briefly sketched the outlines of this concept at common law:

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[20] *Commonwealth v. Royce*, 152 Pa. 88, 25 A. 162 (1892); *Commonwealth v. Hauck*, 103 Pa. 536 (1883); *Northern Central Ry. Co. v. Commonwealth*, 90 Pa. 300 (1879); *Barker v. Commonwealth*, 19 Pa. 412 (1852); *Commonwealth v. Church*, 1 Pa. 105 (1845); *Commonwealth v. Milliman*, 13 Serg. & R. 402 (Pa. 1825); *Commonwealth v. Passmore*, 1 Serg. & R. 217 (Pa. 1814); *Commonwealth v. Mock*, 23 Pa.Super. 51 (1903); *Commonwealth v. Plymouth Twp.*, 19 Pa.Super. 408 (1902); *Commonwealth v. Llewellyn*, 14 Pa.Super. 214 (1900); *Commonwealth v. Shoemaker*, 14 Pa.Super. 194 (1900); *Commonwealth v. Jackson*, 10 Pa.Super. 524 (1899); *Commonwealth v. Cassell*, 1 Pa.Super. 476 (1896).

[21] *Commonwealth v. Linn*, 158 Pa. 22, 27 A. 843 (1893) (indictment charging that the defendant "did, on the public streets and highways, profanely curse and swear, and take the name of God in vain, to the evil example and to the common nuisance of the good citizens . . . of Pennsylvania" held insufficient to charge the crime in the absence of an allegation that it was done "in the presence and hearing of citizens of the Commonwealth passing and repassing on the public streets"); *Delaware Div. Canal Co. v. Commonwealth*, 60 Pa. 367 (1869) (carelessly maintaining canal so that water escaped and formed pools of stagnant water producing "miasmic vapors" to the nuisance of the public held indictable); *Commonwealth v. Mohn*, 52 Pa. 243 (1866) (being a "common scold" and uttering "wicked, scandalous and infamous words" upon a public highway in the hearing of citizens with intent "to debauch and corrupt" their morals held indictable); *Commonwealth v. Van Sickle*, 4 Clark 104, 7 Pa.L.J. 104 (Sup.Ct. 1845) (maintaining a hog pen within the limits of a city held indictable); *Commonwealth v. McKarski*, 208 Pa.Super. 376, 222 A.2d 411 (1966) (false allegation to a police officer that defendant has been struck by a truck and injured held not to constitute public nuisance).

"No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.' The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public. It includes interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, *indecent exhibitions*, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold."

W. Prosser, Law of Torts §88, at 583-85 (4th ed. 1971) (emphasis added, footnotes omitted); accord, 2 R. Anderson, Wharton's Criminal Law & Procedure, §§819-40 (1957).[22] This Court has used essentially this standard in

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[22] "A nuisance as a criminal offense is the misconduct of the defendant or his unreasonable use of his property with the result that unreasonable annoyance, inconvenience, or injury is caused the public."

2 R. Anderson, supra §819, at 683-84.

passing upon civil actions to abate a public nuisance. E. g., *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 410-14, 319 A.2d 871, 881-83 (1974) (discharge of acid mine drainage held a public nuisance); *Pennsylvania SPCA v. Bravo Enterprises*, 428 Pa. 350, 359-61, 237 A.2d 342, 348 (1968) (bullfighting held a public nuisance);[23] *Reid v. Brodsky*, 397 Pa. 463, 156 A.2d 334 (1959) (conduct of taproom in residential neighborhood held a public nuisance).[24]

We need not consider the serious problems of vagueness which might arise from the general use of this standard in criminal prosecutions, for it is clear that the standard for determination of what constitutes a "common or public nuisance" under section 6504 is considerably less specific than that contained in section 5903, which we have already found defective under *Miller*. Consequently, *Miller* forbids the use of section 6504 to criminally punish

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[23] "Injury to the public is the essence of a public nuisance." 428 Pa. at 360, 237 A.2d at 348.

[24] "'"It has been said that a 'fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.' . . . It has also been said: Whether the use is reasonable generally depends upon many and varied facts. No hard and fast rule controls the subject. A use that would be reasonable under one set of facts might be unreasonable under another. What is reasonable is sometimes a question of law, and at other times, a question of fact. No one particular fact is conclusive, but the inference is to be drawn from all the facts, proved whether the controlling fact exists that the use is unreasonable." . . .'"

expression on the basis of obscene content. Because no other basis is offered for declaring the conduct charged in the complaint to be a "common or public nuisance," the complaint must be quashed.

III

Having thus disposed of the criminal proceeding, we turn to the action in equity. In that section the Commonwealth seeks an injunction against future display by appellee, MacDonald of the two films involved in this action on the ground that their exhibition constituted a public nuisance. MacDonald filed preliminary objections in the nature of a demurrer. The trial court sustained these objections and dismissed the complaint on the ground that the invalidity of the obscenity statute left "no legal basis upon which the films in question can be determined to be obscene." We affirm.

[7] Preliminary objections admit, for the purpose of testing the sufficiency of the complaint, all properly pleaded facts, but not conclusions of law. *Ross v. Shawmut Development Corp.*, ... Pa. ...., ... n.2, 333 A.2d 751, 752 n.2 (1975); *Balsbaugh v. Rowland*, 447 Pa. 423, 426, 290 A.2d 85, 87 (1972). The complaint contained allegations regarding the character of the films[25] and the intention of MacDonald to continue displaying them. With regard to the characterization of their display as a public nuisance, it further alleged:

[25] Because our disposition of this case rests on grounds unrelated to the content of these particular films, we need not consider these allegations.

"The films mentioned above have been presented by the Defendant as X-rated movies, but without notice that they are, in fact, hard core pornographic movies and the basest form of obscenity.

* * *

"The display of the above films constitute a public nuisance for the following reasons:

A. They graphically portray perverted sexual acts that tend to currupt and adversely affect the morals and welfare of the public;

B. the owner obtains money for admission under the false pretense that the films provide some socially acceptable form of entertainment when the films rather display obscene materials not protected by the First Amendment of the Constitution of the United States, and are utterly without redeeming social value;

C. no warning concerning the true nature of the obscene acts has been given by the Defendant prior to the entry of members of the public;

D. under the law, children, when accompanied by their parents, are permitted to view the film;

E. it is highly unlikely that the Commonwealth would be able to successfully and safely prevent all persons under the age of seventeen (17) years of age from viewing the said film; [and]

F. the content and suggestions set forth in the films are a danger to the public health and welfare."

The Commonwealth urges three legal bases upon which it contends an injunction may be founded: section 5903(h)

of the Crimes Code,[26] the Act of June 23, 1931,[27] and the common law of public nuisance.[28] We shall consider these in reverse order.

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[26] 18 Pa.C.S. §5903(h) (1974). That subsection provides as follows:

"(h) Injunction—The district attorney of any county in which any person sells, lends, distributes, exhibits, gives away or shows, or is about to sell, lend, distribute, exhibit, give away or show, or has in his possession with intent to sell, resell, lend, distribute, exhibit, give away or show, any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, may institute proceedings in equity in the court of common pleas of said county for the purpose of enjoining the sale, resale, lending, distribution, exhibit, gift or show of such obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, contrary to the provisions of this section, and for such purposes jurisdiction is hereby conferred upon said courts. A preliminary injunction may issue and a hearing thereafter be held thereon in conformity with the Rules of Civil Procedure upon the averment of the district attorney that the sale, resale, lending, distribution, exhibit, gift or show of such publication constitutes a danger to the welfare or peace of the community. The district attorney shall not be required to give bond."

[27] P.L. 1178, 68 P.S. §§467-73 (1965). The pertinent portions of the Act provide as follows:

"Any building, or part of a building, used for the purpose of fornication, lewdness, assignation, and/or prostitution is hereby declared to be a common nuisance; and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to imprisonment for not more than one year, or pay a fine not exceeding one thousand dollars, or both, at the discretion of the court."

Id. §1, 68 P.S. §467.

(Footnote continued on following page)

[8] A thing may be a public nuisance because it is so declared by statute, either explicitly[29] or implicitly.[30] Alternatively, it may be declared a nuisance as a matter of common law if, though not prohibited by statute, it unreasonably interferes with the rights of the public.[31] Because the statutes[32] referred to by the Commonwealth injunctions independently of the common law doctrine of public nuisance, we need only consider whether the conduct alleged in the complaint constitutes a public nuisance because it unreasonably interferes with the rights of the public.

(Footnote continued from preceding page)

"An action to enjoin any nuisances defined in section one of this act may be brought, in the name of the Commonwealth of Pennsylvania, by the Attorney General thereof or by the district attorney of the county concerned. Such action shall be brought and tried as an action in equity in the court of common pleas of the county."

Id. §3, 68 P.S. §469.

[28] See notes 17-21 supra and accompanying text.

[29] See note 24 supra.

[30] See *Pennsylvania SPCA v. Bravo Enterprises*, 428 Pa. 350, 359-61, 237 A.2d 342, 348 (1968) (bullfighting is public nuisance because proscribed by statute, even though statute does not explicitly declare it to be public nuisance).

[31] See *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 410-14, 319 A.2d 871, 881-83 (1974), (discharge of acid mine drainage); *Reid v. Brodsky*, 397 Pa. 463, 156 A.2d 334 (1959) (conduct of taproom in a residential neighborhood).

[32] These are section 5903 of the Crimes Code and the Act of June 23, 1931. See notes 1, 23, & 24 supra.

[9] This precise theory of common law public nuisance was urged in *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (3rd Cir. 1969), also an action to enjoin exhibition of a motion picture. The Third Circuit, in an opinion by Judge Aldisert, held that the First Amendment forbade an injunction based upon such a theory:

> "We have concluded that as a standard for regulating First Amendment rights, neither 'injury to the public,' nor 'unreasonableness,' standing alone, is sufficiently narrow or precise to pass constitutional muster. Each is too elastic and amorphous a standard by which to restrain the exercise of free expression. What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under 'a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.' *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.Ed. 1213 (1940).
>
> "The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as the vehicle for its retraint."

Id. at 88. We agree with this analysis and therefore hold the Commonwealth is not entitled, under a theory of common law public nuisance, to the injunction it seeks.[33]

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[33] This disposition of the attempt to obtain an injunction based upon a theory of common law public nuisance renders it unnecessary to

(Footnote continued on following page)

We next turn to the Commonwealth's contention that an injunction might issue in this case under the Act of June 23, 1931. That statute authorizes an injunction against the use of any building "for the purpose of fornication, lewdness, assignation, and/or prostitution."[34] The Commonwealth urges that "lewd" is a synonym for "obscene", citing Black's Law Dictionary, at 1052 (4th ed. 1957),[35] and that the statute therefore forbids the use of a building to exhibit obscene materials. We do not agree.

Far more important than mere dictionary definitions is the statutory context in which the word "lewdness" appears. See, e. g., *Commonwealth v. Morgan*, ... Pa. ...., ..., 331 A.2d 444, 446 (1975); 2A J. Sutherland, Statutes and Statutory Construction §47.16 (4th ed. C. Sands 1973). That context proscribes use of any building "for the purpose of fornication, . . . assignation, and/or prostitution." All of these forbidden purposes involve illicit sexual *conduct*, thus strongly indicating a legislative intention to proscribe only purposes of this type when it

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(Footnote continued from preceding page)
decide the dispute between the parties as to the authority of the district attorney to maintain an action in equity on such a theory. See *Duggan v. Guild Theatre, Inc.*, 436 Pa. 191, 195, 258 A.2d 858, 860-61 (1969) (opinion announcing the judgment) (district attorney had implied authority to seek injunction against exhibition of obscene motion picture).

[34] See note 24 supra.

[35] The Commonwealth fails to mention that the definition continues: "Lustful, indecent, lascivious, lecherous." This sense of "lewd" is in accord with the construction we adopt. Moreover the statutory term is not "lewd" but "lewdness." The primary definition of "lewdness" given by the Commonwealth's own authority is "gross and wanton indecency in sexual relations."

used the word "lewdness." Such a construction has the further advantage of obviating any problems of vagueness which might be entailed by construing the term "lewdness" in a broader fashion.[36]

[10] We therefore hold that the Act of June 23, 1931, proscribes only the use of a building for the purpose of engaging in illicit sexual conduct. Because the complaint does not allege that any building is being so used, there is no basis for issuance of an injunction under the Act of June 23, 1931.

[11] The final basis on which the Commonwealth seeks to predicate an injunction is section 5903(h) of the Crimes Code.[37] This section authorizes injunctive proceedings to prevent the "exhibit . . . or show of [any] obscene . . . photograph, figure or image." However, it relies upon the definition of obscene contained in section 5903(b),[38] which we have held inadequate to satisfy the *Miller* standard. Consequently, if that standard applies to injunctive proceedings as well as criminal prosecutions, the Commonwealth's action must fail. We conclude that the *Miller* standard does apply to injunctive proceedings. Therefore, the Commonwealth is not entitled to an injunction under section 5903(h) in the absence of a definition of obscenity which complies with the requirements of *Miller*.

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[36] See generally *Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972), and cases there cited; Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960). We clearly must construe this statute in light of the vagueness doctrine because it makes the conduct described criminal in addition to authorizing injunctive proceedings.

[37] See note 23 supra.

[38] See note 1 supra.

The starting point for our analysis must be *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973) [hereinafter *Paris Adult Theatre*]. Decided the same day as *Miller*, *Paris Adult Theatre* was a case in which the Georgia courts had concluded that exhibition of two motion pictures should be enjoined on the ground of obscenity. After rejecting the various arguments of the petitioners to the effect that their conduct was immunized from regulation by the First Amendment, the Supreme Court vacated the judgment and remanded for further proceedings:

> "[N]othing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, *provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v. California, supra,* [413 U.S.] at 23-25 [93 S.Ct. at 2614-2616]. The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller v. California, supra.* See *United States v. 12 200-Foot Reels of Super 8mm. Film,* [413 U.S.] at 130 n. 7 [93 S.Ct. at 2670 n. 7]."

413 U.S. at 69-70, 93 S.Ct. at 2642 (emphasis added).

Both the language emphasized in the above passage and the citation to *United States v. 12 200-ft. Reels of Super 8mm. Film*[39] clearly indicate that the *Miller* standard is fully applicable to injunctive proceedings such as that involved in *Paris Adult Theatre*. This conclusion is bolstered by the fact that it represents the consensus of all jurisdictions which have considered the standard to be applied in

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[39] The pertinent portion of the cited footnote is set forth in text at page 298 supra.

injunctive proceedings since the decision in *Paris Adult Theatre*. See *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. denied, 418 U.S. 939, 94 S.Ct. 3227, 41 L.Ed.2d 1173 (1974); *Hall v. Commonwealth*, 505 S.W.2d 166 (Ky. 1974); *Mangum v. Maryland State Board of Censors*, 273 Md. 166, 328 A.2d 283 (1974); *State ex rel. Wampler v. Bird*, 499 S.W.2d 780 (Mo.1973); *State ex rel. Keating v. A Motion Picture Film Entitled "Vixen"*, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973); *Art Theatre Guild, Inc. v. State*, Tenn., 510 S.W.2d 258 (1974).

Because the definition of obscenity applicable in proceedings under section 5903(h) is inadequate to satisfy the *Miller* standard, the First Amendment forbids issuance of any injunction under that section unless and until an adequate definition is supplied by the General Assembly.

Order quashing criminal complaint affirmed. Decree dismissing complaint in equity affirmed. Each party pay own costs.

EAGEN, O'BRIEN and NIX, JJ., concur in the result.

JONES, C. J., dissents.

MANDERINO, J., did not participate in the consideration or decision of these cases.

Exhibit No. 2.

DOCKET ENTRIES.

Complaint in Equity filed. Rule filed.

And now, to wit, this 30th day of April, 1974, a rule is granted upon the Defendant, Charles McDonald, to show cause why a Preliminary Injunction and the other relief requested should not be granted as prayed for.

This rule shall be returnable on the 13th day of May, 1974, By the Court, Robert I. Shadle, Judge.

May 1, 1974, Served the within complaint in Equity upon the defendant, Charles McDonald. So answers, Oliver C. Nace, Sheriff.

May 10, 1974, Preliminary Objections filed. Harold N. Fitzkee, Jr. and Donn I. Cohen, Attorneys for Defendant.

June 7, 1974, Opinion and Order filed.

And now, to wit, this 7th day of June, 1974, defendants preliminary objection in the nature of a demurrer to plaintiff's complaint is sustained and the complaint is dismissed. An exception is noted for plaintiff. By the Court, Robert I. Shadle, Judge. (*Vide* Opinion and Order filed).

August 5, 1974, Certiorari to the Court of Common Pleas of York County, Penna. from the Commonwealth of Pennsylvania Supreme Court, Returnable Forthwith, Rule on the Appellee, to appear and plead on the return-day of the writ to No. 34 May Term 1974. Witness, The Honorable Benjamin R. Jones, Doctor of Laws, Chief Justice of our said Supreme Court at Harrisburg, the 11th day of June in the year of our Lord one thousand nine hundred and seventy four.

Certified from the records of the Court of Common Pleas of York County, Pennsylvania this 14th day of August, A. D., 1974.

SAMUEL F. MEISENHELDER,

(Seal) *Prothonotary.*

Served the within Complaint in Equity upon Charles McDonald the within named defendant by handing to and leaving with him a true and attested copy of the same at Yorktowne Motor Inn (Room 827), York, Penna. at 9:00 O'clock A.M., May 1, 1974 and informed him of the contents thereof.

Sheriff's Costs $11.23 Paid.

So Answers, Oliver C. Nace, Sheriff of York County.

Sworn to this 17th day of May, 1974.

S. F. MEISENHELDER,
Prothonotary.

Exhibit No. 3.

COMPLAINT.

(Filed April 30, 1974.)

1.

The Plaintiff is the Commonwealth of Pennsylvania, and this action is filed by Donald L. Reihart, District Attorney of York County, on behalf of the said Plaintiff.

2.

The Defendant is Charles McDonald, an adult individual, and owner of the premises located at 30 East Jackson Street, York, York County, Pennsylvania, known as the Southern Theatre.

3.

On April 17 and April 18, 1974, the Defendant obtained, advertised and displayed two films. These films were entitled "Deep Throat" and "The Devil and Miss Jones". Both these films were shown as part of a double feature at the Southern Theatre in York, York County, Pennsylvania.

4.

A. "Deep Throat" is a sound motion picture in color with a running time of about one hour. The film portrays a woman who repeatedly perpetrates acts of fellatio. These acts are clearly displayed. In one scene, two nude males and one nude female engage in various sexual acts including cunnilingus and fellatio. In this movie there is the repeated showing of human male and female genitals in a state of sexual excitement.

B. The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

C. The said movie is obscene as obscenity has been defined by the Supreme Court of the United States in *Miller vs. California,* 93 S. Ct. 2607 (1973), and constitutes hard core pornography.

5.

A. "The Devil and Miss Jones" is also a sound motion picture in color with a running time of approximately one hour. This film is about a virgin who committed suicide and was sent to a "reviewer" in hell. It was the reviewer's purpose to determine what should happen to Miss Jones.

Miss Jones indicated she wanted to go back and live for a little more time "Just for lust". She was introduced to a man who called himself the "teacher". The teacher taught her various sexual acts. In film she graphically engages in acts of fellatio, cunnilingus and in one scene she sucks upon the head of a live snake. This film has scenes where fruit, such as apples and grapes, are placed into the vagina and rectum, and then removed and eaten.

B. The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

C. The said movie is obscene as obscenity has been defined by the Supreme Court of the United States in Miller vs. California, 93 S. Ct. 2607 (1973), and constitutes hard core pornography.

6.

The films mentioned above have been presented by the Defendant as X-rated movies, but without notice that they are, in fact, hard core pornographic movies and the basest form of obscenity.

7.

The Defendant desires to show these films and there is evidence that copies are available to him.

8.

The display of the above films constitute a public nuisance for the following reasons:

A. They graphically protray perverted sexual acts that tend to corrupt and adversely affect the morals and welfare of the public;

B. the owner obtains money for admission under the false pretense that the films provide some socially acceptable form of entertainment when the films rather display obscene materials not protected by the First Amendment of the Constitution of the United States, and are utterly without redeeming social value;

C. no warning concerning the true nature of the obscene acts has been given by the Defendant prior to the entry of members of the public;

D. under the law, children, when accompanied by their parents, are permitted to view the film;

E. it is highly unlikely that the Commonwealth would be able to successfully and safely prevent all persons under the age of seventeen (17) years of age from viewing the said film;

F. the content and suggestions set forth in the films are a danger to the public health and welfare.

9.

On April 18, 1974 following the most recent procedural guidelines set down by the Supreme Court of the United States, the above films were seized pursuant to a search warrant lawfully obtained by a member of the York City Police Department. The Defendant was charged with a violation of Sections 5903 and 6504 of the Crimes Code of Pennsylvania.

10.

The new Supreme Court guidelines require an adversary hearing on a question of obscenity to be held promptly.

11.

Under the criminal procedures currently in effect in the Commonwealth of Pennsylvania, there is no prompt way that an adversary hearing can be established by the Commonwealth.

12.

The sale, re-sale, lending, distribution, exhibition, gift or display of such films as set forth above constitutes a danger to the welfare and peace of the community.

13.

There is no adequate remedy at law.

14.

The District Attorney of York County has standing to bring this suit by virtue of the Act of July 5, 1957, P.L. 484, No. 275, Sec. 1; the Act of December 6, 1972, P.L., No. 334, Sec. 1; and as a necessary power of the Office of District Attorney.

WHEREFORE, the Plaintiff prays:

A. That the preliminary hearing be scheduled promptly to determine whether the films set forth above are obscene;

B. that a preliminary hearing be scheduled promptly to determine whether the showing of said films constitutes a public nuisance;

C. that following such a hearing that a preliminary injunction issue barring the Defendant from exhibiting said films until a final hearing can be held;

D. that following an appropriate hearing the Court grant an injunction to enjoin and forever bar the said Devendant from advertising and displaying to the public the films above described;

E. such other equitable relief as the Court deems necessary and proper.

DONALD L. REIHART,
District Attorney of
York County.

Commonwealth of Pennsylvania,
County of York. } ss.:

Personally appeared before me, Clair R. Stine, Clerk of Courts in and for the said County and State, Donald L. Reihart, Esq., District Attorney in and for York County, Pennsylvania, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

DONALD L. REIHART, ESQ.,
District Attorney.

Sworn and subscribed to before me this 29th day of April, 1974.

CLAIR R. STINE,
(Seal) *Clerk of Courts.*

Rule.

AND NOW, TO WIT, this 30 day of April, 1974, a Rule is granted upon the Defendant, Charles McDonald, to show cause why a Preliminary Injunction and the other relief requested should not be granted as prayed for.

This Rule shall be returnable on the 13 day of May, 1974.

BY THE COURT,
ROBERT I. SHADLE, *J.*

Exhibit No. 4.

PRELIMINARY OBJECTIONS.

(Filed May 10, 1974.)

PETITION RAISING QUESTION OF JURISDICTION

1. Section 5903(h) of the Pennsylvania Crimes Code, Act of December 6, 1972, P.L. ...., No. 344, Sec. 1, 18 C.P.S.A. Sec. 5903(h) (hereinafter called the "Statute"), purports to create equitable jurisdiction to enjoin the sale, resale, lending, distribution, exhibit, gift, or show of certain things enumerated therein under the circumstances defined and described in the Statute.

2. The Statute does not mention, refer to, or confer jurisdiction with regard to motion pictures.

3. The Statute is unconstitutional in that it violates the Defendant's rights under the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

4. The procedure set forth in the Statute is unconstitutional and provides no constitutional basis for an action in equity. *Gundlach v. Rauhauser,* 304 F. Supp. 962 (M.D. Pa., 1969).

5. The procedure adopted by the plaintiff in the within action lacks constitutional authority and provides no constitutional basis for an action in equity. *Duggan v. 807 Liberty Avenue, Inc.*, 447 Pa. 281, 288 A.2d 750 (1972).

WHEREFORE, Defendant moves Your Honorable Court to dismiss the Complaint in that this Court lacks jurisdiction.

DEMURRER

6. The Complaint fails to set forth what, if any, community standards relating to the representation of sexual matters are to be followed in determining the obscenity *vel non* of the within motion pictures; unless community standards relating to the representation of sexual matters are referred to and proved, the application of the Statute to Defendant is constitutionally barred.

7. The Statute does not apply to motion pictures, and, further, is violative of the Defendant's rights under the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, Defendant moves Your Honorable Court to dismiss the Complaint in that it fails to state a constitutional cause of action against the Defendant.

8. The Complaint contains no allegation or allegations setting forth facts averring conduct on the part of the Defendant constituting a public nuisance.

9. The Complaint fails to allege that Plaintiff has suffered or will suffer irreparable harm.

WHEREFORE, Defendant moves Your Honorable Court to dismiss the Complaint in that it fails to set forth a cause of action in equity against the Defendant.

10. The Complaint fails to set forth a cause of action against the Defendant upon which the Plaintiff is entitled to relief or upon which the Court may act.

WHEREFORE, Defendant moves Your Honorable Court to dismiss the Complaint in that it fails to set forth a cause of action against the Defendant.

PETITION RAISING DEFENSE OF LACK OF CAPACITY TO SUE

11. No authority exists for the District Attorney of York County to bring this action either in the name of the Commonwealth or in his own name.

WHEREFORE, Defendant moves Your Honorable Court to dismiss this action on account of Plaintiff's lack of capacity to sue.

PETITION BASED ON PRIOR STAY ORDER

12. On April 26, 1974, Your Honorable Court issued a Stay Order directing, in effect, a stay of all proceedings arising out of the showing of the motion pictures in question pending determination by Your Honorable Court of certain motions filed by the Defendant.

13. This equity action on the part of the District Attorney violates Your Honorable Court's prior Stay Order.

WHEREFORE, Defendant moves Your Honorable Court to dismiss this action as violative of its prior Stay Order.

In The Alternative

MOTION FOR A MORE SPECIFIC PLEADING

14. The Complaint fails to set forth what, if any, community standards relating to the representation of sexual matters are to be followed in determining the obscenity *vel non* of the within motion pictures; unless community standards relating to the representation of sexual matters are referred to and proved, the application of the Statute to Defendant is constitutionally barred.

WHEREFORE, in the alternative, Defendant moves Your Honorable Court to direct Plaintiff to file a more specific pleading setting forth what, if any, community standards relating to the representation of sexual matters are to be followed in determining the obscenity *vel non* of the within motion pictures.

Respectfully submitted,

LIVERANT, SENFT AND
COHEN,
By Donn I. Cohen.

GAILEY, FITZKEE AND
GATES,
By Harold N. Fitzkee, Jr.

Exhibit No. 5.

OPINION.

(Filed June 7, 1974.)

IN THE COURT OF COMMON PLEAS
Of York County, Pennsylvania

COMMONWEALTH OF PENNSYLVANIA,

vs.

CHARLES MacDONALD.

Civil Action
No. 34 May Term, 1974

Equity

Appearances:

Donald L. Reihart, Esquire, District Attorney, for Plaintiff.

Harold N. Fitzkee, Jr., Esquire, and Donn I. Cohen, Esquire, for Defendant.

The Commonwealth of Pennsylvania, acting through the District Attorney of York County, instituted this action in equity, alleging that defendant displayed, and desires to continue to display, two motion picture films alleged by plaintiff to be obscene and to therefore constitute a public nuisance. The complaint prays that defendant be both preliminarily and permanently enjoined from such exhibition. The action is brought under Section 5903 (h) of the Crimes Code of December 6, 1972, P.L. ..... No. 334, 18 C. P. S. A. 5903, which prohibits exhibition of

obscene material as therein defined, and authorizes such injunctive proceeding to prevent such exhibition. Defendant filed preliminary objections to the complaint, alleging, *inter alia,* that it fails to state a cause of action upon which relief can be granted because the statutory section upon which it is based is constitutionally invalid. The issue was submitted on briefs by both parties.

In an opinion filed this date in this court in *Com. v. MacDonald, et al.,* Criminal Action No. M-24, January Sessions, 1974, we held Section 5903 of the Crimes Code to be unconstitutional on the ground that it fails to define obscenity as required by *Miller v. California,* 413 U. S. 15, 37 L. Ed(2d) 419 (1973).

Consequently, there being no legal basis upon which the films in question can be determined to be obscene, there is no ground upon which defendant can be enjoined from exhibiting them for that reason.

Order.

AND NOW, TO WIT: This 7th day of June, 1974, defendant's preliminary objection in the nature of a demurrer to plaintiff's complaint is sustained, and the complaint is dismissed. An exception is noted for plaintiff.

BY THE COURT:
ROBERT I. SHADLE,
Judge.